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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CHARLES HARKEY, Plaintiff and Appellant, v. DON CORNELIUS PRODUCTIONS, INC., et al., Defendants and Respondents.	B172815 (Los Angeles County Super. Ct. No. SC075519)

APPEAL from a judgment of the Superior Court of Los Angeles County. Linda K. Lefkowitz, Judge. Affirmed.

Atkins & Evans, Nelson L. Atkins and Igbodike G. Obioha for Plaintiff and Appellant.

Valensi, Rose, Magaram, Morris & Murphy and Stephen F. Moeller for Defendants and Respondents.

* * * * * *

Appellant Charles Harkey appeals from a judgment entered after the trial court granted the special motion to strike of respondents Don Cornelius and Don Cornelius Productions, Inc. (referred to as Cornelius or Cornelius Productions, respectively, or collectively as respondents). We affirm.

CONTENTIONS

Appellant contends that: (1) Code of Civil Procedure section 425.17 bars respondents' special motion to strike; and (2) the trial court erred in granting respondents' special motion to strike because (a) the published statements were not exclusively commercial speech, (b) the trial court erred in determining that respondents were not required to independently demonstrate that the statements concerned an issue of public significance, (c) the trial court erred in finding that the published statements constitute speech in connection with an "issue of public interest," and (d) the trial court erred in finding that appellant had not established a probability of success on the merits.

FACTS AND PROCEDURAL BACKGROUND

On March 20, 2003, appellant filed a complaint against respondents for: (1) libel; (2) trade libel; (3) unfair competition and unfair business practices; (4) intentional interference with prospective economic advantage; and (5) negligent interference with prospective economic advantage (the 2003 complaint).

The 2003 complaint alleged that Cornelius is the president and agent of Cornelius Productions. Respondents produce a nationally syndicated weekly television show, Soul Train, as well as three annual television programs: (1) the Soul Train Music Awards; (2) the Soul Train Lady of Soul Awards; and (3) the Soul Train Christmas Starfest.

According to the 2003 complaint, appellant is the owner of Inglewood Tickets, a nationwide ticket distributor that offers tickets for sporting events, concerts, theater and special events via the website www.inglewoodtickets.com. In previous years, appellant has sold legally acquired tickets for the Soul Train Music Awards Show, but did not sell tickets in 2001.

On March 21, 2002, respondents allegedly published a warning on their website. The warning stated: "Soul Train Music Awards Ticket Rip-Off By Internet Ticket Scalpers: [¶] . . . Warning to All Soul Train and Lady of Soul Awards Fans and Friends." In large, block font, the warning stated that internet ticket scalpers may offer unauthorized tickets to Soul Train Music Awards programs and attempt to charge fans amounts several times more than the authorized price for the tickets. The warning stated that such tickets would not be honored at the events. The warning then gave a list of the internet sites that were unlawful ticket scalping operations, including appellant's website.

After appellant filed the 2003 complaint, respondents filed a notice of related case on the basis that appellant had filed a previous complaint, alleging the same causes of action against respondents, on September 24, 2002 (the 2002 complaint). The 2002 complaint alleged that the statement was published on respondents' website in March 2001, while the 2003 complaint alleged a publication date of March 2002. On February 4, 2003, the Honorable Allan J. Goodman granted respondents' motion to strike the 2002 complaint and awarded respondents attorney fees and costs of $17,458.[1]

The 2003 complaint was reassigned to the Honorable Allan J. Goodman on June 11, 2003. Upon the filing of appellant's motion for peremptory disqualification, the case was reassigned to the Honorable Linda K. Lefkowitz.

Respondents filed a motion to strike under Code of Civil Procedure section 425.16.[2] On October 16, 2003, the trial court granted the special motion to strike and awarded respondents approximately $7,000 in attorney fees. The trial court also overruled respondents' demurrer and denied respondents' motion to strike under sections 435 and 436.

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[1] Our research indiates that no appeal was filed in connection with the 2002 complaint.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

This appeal followed.

DISCUSSION

I. The anti-SLAPP statute

Section 425.16, also known as the anti-SLAPP (strategic lawsuit against public participation) statute, permits a court to dismiss certain nonmeritorious claims in the early stages of the lawsuit. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) Under section 425.16, subdivision (b)(1), "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The SLAPP suits "are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68.)

Section 425.16, subdivision (e) defines acts taken in furtherance of a person's right of petition or free speech in connection with a public issue to include: (1) written or oral statements or writings made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) written or oral statements or writings made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(1)-(4).)

In determining whether to grant or deny a section 425.16 motion to strike, the court engages in a two-step process. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.) First, the court must decide whether the defendant has met his or

her threshold burden of showing that his or her acts were taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. (*Ibid*.) If the defendant meets his or her burden, then the court determines whether the plaintiff has carried his or her burden of showing that there is a probability that he or she will prevail on the claim. (*Id.* at pp. 150-151.)

On appeal, we independently review whether section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

II. Whether section 425.17 applies

The past several years have seen an increase in the filing of special motions to strike in matters which the anti-SLAPP legislation was not designed to preclude. Section 425.17, effective January 1, 2004, was enacted to discourage the abuse of the anti-SLAPP law and retroactively applies to this matter. (*Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 691 [§ 425.17 is given retrospective application because it is a procedural, rather than a substantive, statute that affects pending actions].) However, we conclude that, contrary to appellant's assertion, section 425.17 does not bar respondents' special motion to strike.

Section 425.17, subdivisions (b) and (c) bar the use of the special motion to strike in certain circumstances. Section 425.17, subdivision (b) provides that the special motion to strike shall not be applied to actions brought in the public interest if (1) the plaintiff does not seek any relief greater than or different from the relief sought for the general public; (2) the action would enforce an important right affecting the public interest; and (3) private enforcement is necessary and places a disproportionate financial burden on the plaintiff.[3]

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[3] Section 425.17, subdivision (b) provides that: "Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is

Section 425.17, subdivision (c) provides that a special motion to strike shall not apply to causes of action brought against a person engaged in the business of selling or leasing goods or services, including insurance, securities, or financial instruments. Under that subdivision, the challenged statement must be a statement of fact about that person's or a business competitor's business operations, goods or services, that is made for the purpose of obtaining sales or leases of commercial transactions in the person's goods or services. (§ 425.17, subd. (c)(1).) Moreover, the intended audience must be an actual or potential buyer or customer. (§ 425.17, subd. (c)(2).)[4]

Significantly for our purposes, section 425.17, subdivision (d) sets forth exceptions to the bar of subdivisions (b) and (c), including: "(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work,

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a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision. [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

[4] Section 425.17, subdivision (c) states that: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or orders securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation."

Here, the 2003 complaint alleges, and it is undisputed, that respondents are television producers and the warning statement arose out of the production of the Soul Train Music Awards and Lady of Soul television shows. The challenged statement consists of warnings to members of the general public regarding problems that could arise from using unauthorized tickets to these programs. We conclude that the warning statement falls within the exception of section 425.17, subdivision (d). Therefore, respondents were not barred from bringing a special motion to strike under section 425.16.

We are not convinced by appellant's argument that section 425.17, subdivision (c) applies to bar the special motion to strike. That subdivision concerns "persons primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments." (§ 425.17, subd. (c).) There is no evidence or allegation that respondents were engaged in such businesses, as opposed to the production of television programs. Nor was the warning statement a representation of fact about respondents' or appellant's operations, goods, or services made for the purpose of promoting respondents' own services, as required in section 425.17, subdivision (c)(1).) Rather, the notices warned the general public of the existence of ticket scalpers selling bootleg tickets. In any event, the exception of section 425.17, subdivision (d)(2) takes the matter out of section 425.17, subdivision (c).

We conclude that section 425.17 does not bar the special motion to strike.

III. Whether the trial court erred in granting respondents' special motion to strike under section 425.16

A. Whether the challenged warnings were matters of public interest or made in furtherance of constitutional rights of free speech

The trial court concluded that respondents showed that under section 425.16, subdivision (e), the challenged warnings were communications entitled to constitutional protection. We agree.

Section 425.16, subdivision (e) defines acts taken in furtherance of a person's right of petition in connection with a public issue to include subdivision (e)(3), written or oral statements made in a place open to the public or a public forum in connection with an issue of public interest, and subdivision (e)(4), any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

We initially note that the internet is a public forum, and there is no dispute that the warnings were posted to the general public on the internet. (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119; *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at pp. 1007-1008.)

We also conclude that the statements were made in connection with an issue of public interest within the meaning of section 425.16, subdivision (e)(3) and were made in the exercise of respondents' constitutional right of free speech under section 425.16, subdivision (e)(4).

A matter of public interest does not equate to mere curiosity. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) It is something of concern to a substantial number of people rather than to a small, specific audience. (*Ibid.*) There must be a relationship between the challenged statements and the public interest, and the focus of the speaker's conduct should be the public interest; the assertion of a broad and amorphous public interest is not sufficient. (*Id.* at pp. 1132-1133.) Thus, statements of public interest were found to exist where they involved a large church that had been the subject of extensive media coverage, concerned a shelter that had been the subject of public controversy

including land use hearings, and alleged domestic violence against a nationally known political consultant who had used the domestic violence issue in political campaigns. (*Id.*, citing cases at p. 1133.)

Here, the statement posted on the internet warned the general public that ticket brokers were attempting to sell unauthorized and invalid tickets at inflated prices that would not be honored. Appellant's citation to *Consumer Justice Center v. Trimedia International, Inc.* (2003) 107 Cal.App.4th 595, for the proposition that the statement at issue was unprotected as purely commercial speech does not avail it. In that case, the court held that the special motion to strike could not be used to protect advertising literature disseminated by a company regarding the specific properties and efficacy of "Grobust," an herbal product purporting to cause breasts to enlarge.

Here, the challenged warning was not purely commercial in nature, as the court characterized the Grobust advertisements. This case is more like *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at pages 1007-1008, where the Fourth Appellate District held that internet postings criticizing another company, its products, and officers concerned a public issue for purposes of section 425.16 because the site was open to the public and affected the lives of many individuals. As observed in *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67, matters of public interest may include products liability suits, real estate or investment scams.

While respondents had an interest in promoting its awards programs, the warning was not an advertisement of its programs. Rather, the statement, made in exercise of respondents' free speech rights, warned the general public of a fraud that could be perpetuated upon it, the existence of internet ticket sellers offering tickets for sale at inflated prices, and the probability that the tickets would not be honored. These are clearly matters that concern the general public, and especially the audience of internet ticket buyers. Since we conclude that the warning statement concerned a matter of public interest, it does not matter whether the trial court erred, as appellant asserts, in stating that

respondents need not separately and independently demonstrate that the warning statement concerned an issue of public significance.

B. Whether appellant established a prima facie case of probability of success on the merits

1. Libel

We also conclude that the trial court did not err in finding that appellant failed to establish a probability of success on the merits. In making its determination, the court may look at the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (§ 425.16, subd. (b)(2).)

In order to prove a cause of action for libel, the plaintiff must show that the defendant has published a written communication that is false, unprivileged, and exposes the subject of the communication to hatred, contempt, ridicule, obloquy, or causes him to be shunned or avoided, or has a tendency to injure him in his occupation. (Civ. Code, § 45; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970). An accusation of commission of a crime is libel per se. (Civ. Code, §§ 45, 45a; *Weinberg v. Feisel, supra,* 110 Cal.App.4th at p. 1135.)

Appellant cites to his declaration, attached to the opposition to the motion to strike, as proof that he has a probability of prevailing on the libel cause of action. He claims the declaration shows that he is not a scalper and that he has a business license in compliance with Business and Professions Code section 22500. The declaration states that appellant did not sell tickets to Soul Train events in 2002, and that when he sold them in the past, he "acquired them through independent vendors or individuals who have sold the tickets to [him] for resale, which is the manner and custom in which [his] business and similar ticket agencies operate."

Like the trial court, we conclude that such a self-serving statement is insufficient to establish a probability of success on the merits. Appellant has not produced any records establishing the manner in which, or from whom, he purchased the tickets in order to prove they were not fraudulently manufactured or obtained. Appellant has not

produced declarations from authorized third parties indicating that the tickets were sold to him in a legal manner. Nor has he attached exhibits showing that he has a business license to support his claim that he operates his business in accordance with Business and Professions Code sections 22500 through 22511.

2. Unfair competition

Business & Professions Code section 17200 protects the public from unfair business practices. It precludes the use of any unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising. (Bus. & Prof. Code, § 17200.) Appellant's claim that he demonstrated a probability of success on the merits because the declaration shows that the public was likely to be deceived, fails. As we have previously discussed, appellant's conclusory and self-serving declaration did not establish that he is or ever was an authorized ticket seller to the award programs.

3. Intentional and negligent interference with prospective economic advantage

In order to prove intentional and negligent interference with prospective economic advantage, the plaintiff must show a specific relationship between himself and a third party as well as knowledge and acts on the part of the defendant. Appellant has failed to make such a showing.

The elements of a claim for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) In order to establish a cause of action for negligent interference with prospective economic advantage, the plaintiff must demonstrate that: (1) an economic relationship existed between the plaintiff and a third

party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care, its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefit or advantage reasonably expected from the relationship. (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

Appellant fails to show the probability of succeeding on the merits in both causes of action. His declaration shows no evidence of an economic relationship between himself and a third party, respondents' knowledge of the relationship, or respondents' intentional or negligent actions disrupting the relationship. Finally, appellant has not shown any records of past profits from the sale of Soul Train Awards Program tickets to establish damages.

DISPOSITION

The judgment is affirmed. Respondents shall receive costs of appeal.

NOT FOR PUBLICATION.

_____ J.
NOTT

We concur:

_____ P. J.
BOREN

_____ J.
ASHMANN-GERST